Supreme Court, U.S.
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No. 98-1056

In The

Supreme Court of the United States

October Term, 1998

CITY OF LITTLE ROCK,

Petitioner,

vs.

CHARLES GOSS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether Petitioner's Petition for Writ of Certiorari is untimely.

Whether *Dolan v. Tigard* applies to an unconstitutional condition placed upon the grant of a rezoning application.

Whether subject matter jurisdiction is conferred upon a federal district court when there is no appropriate state court remedy.

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STATEMENT OF THE CASE

Cross-Petitioner, Charles Goss, owns a small business in Little Rock, Arkansas, consisting of a convenience store, gas station, laundromat and car wash, which small business Mr. Goss has owned since 1973. Petitioner City of Little Rock, Arkansas, is a municipality, and is the capitol of the State of Arkansas.

In 1971, at the time Mr. Goss purchased the approximately 3.7 acres of property at issue, the property was located in a portion of rural, unincorporated Pulaski County, some ten (10) miles southwest of downtown Little Rock. Within two (2) years after purchasing the property, Mr. Goss began to operate a series of small, neighborhood-oriented businesses upon the property, including a convenience store, gas station, laundromat and car wash. In 1985, the City of Little Rock annexed that portion of rural, unincorporated Pulaski County within which Mr. Goss' property is located, and zoned the area by default as R-2, Single Family Residential. As the R-2 zoning imposed by default upon the property did not conform to the use to which the property was being put in 1985, Mr. Goss continued to utilize the property as he had since 1973 pursuant to the non-conforming use exception in the Little Rock City Ordinances.

As the R-2 zoning imposed by default upon the property did not conform to the use of the property, and as Mr. Goss needed the property rezoned to conform to its use in order to sell the property, in early 1993 Mr. Goss applied to the City for rezoning of the property. After completion of the application, Mr. Goss went before the City's Planning Commission, which recommended that

Mr. Goss' rezoning application be approved, *on the condition that* Mr. Goss' deed to the City, via a Quitclaim Deed supplied by the City's Planning Commission, a 55 foot right-of-way extending across his 633.38 feet of frontage on Stagecoach Road, also known as State Highway Number Five. The City's Planning Commission informed Mr. Goss via letter that if Mr. Goss did not deliver the demanded Quitclaim Deed to the City within twenty (20) days, the City's Planning Commission would take approval of Mr. Goss' rezoning petition off of the City Board of Directors' meeting agenda. Mr. Goss refused to deliver the demanded Quitclaim Deed to the City's Planning Commission, and his rezoning petition was taken off of the City Board of Directors' meeting agenda. Instead, Mr. Goss asked that the dedication requirement imposed by the City's Planning Commission be waived.

Finally, and only after hiring a succession of attorneys to represent him, Mr. Goss was allowed to bring the item before the City's Board of Directors on February 21, 1995 for a final vote upon the waiver of the City's dedication requirement some twenty (20) months after Mr. Goss initially filed the application. The Board of Directors of the City of Little Rock, after a lengthy discussion, refused to approve Mr. Goss' requested waiver of the dedication requirement of a 55 foot right-of-way across the front of the property. Instead, the City formally imposed the condition that, in order for the property to be rezoned, Mr. Goss would be required to dedicate to the City of Little Rock, free of charge, a 55 foot right-of-way in exchange for rezoning the property at issue to C-3. Mr. Goss refused to consent to the City's demand.

As the only state remedy available to Mr. Goss would result in the loss of his property to the City of Little Rock, which is the result Mr. Goss sought to prevent, Mr. Goss filed suit against the City of Little Rock seeking injunctive relief to prevent the taking altogether, as the City of Little Rock had applied an unconstitutional condition to the grant of its discretionary authority to rezone his property. The United States District Court, Eastern District of Arkansas, Western Division, quickly dismissed Mr. Goss' lawsuit based upon Rules 12(b)(6) and 12(b)(1) of the *Federal Rules of Civil Procedure* for failure to state a claim upon which relief could be granted and for lack of subject matter jurisdiction, and specifically stated that *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) did not apply to the facts of the case. *See* Petitioner's Appendices C & D. Mr. Goss timely appealed to the United States Court of Appeals for the Eighth Circuit, which thereafter reversed the district court's dismissal, and specifically stated that *Nollan* and *Dolan* did apply to the facts of the case. *See* Petitioner's Appendix B.

The case was tried before District Court Judge Susan Webber Wright on January 13 and 14, 1997. The district court issued its opinion on February 20, 1997, which opinion concluded that the City of Little Rock had indeed attempted a taking of Mr. Goss' property by applying an unconstitutional condition to its grant of rezoning, in contravention of *Nollan* and *Dolan*, and further ordered that, in accordance with the injunctive relief requested by Mr. Goss in his Complaint, issued a mandate to the City of Little Rock to rezone Mr. Goss' property to C-3, but

denied Mr. Goss his compensatory damages and attorney's fees. *See* Petitioner's Appendices E and F. The City of Little Rock, Petitioner herein, did not seek a Writ of Certiorari before this Honorable Court within the time allowed by Rule 13.1 of the *Rules of the Supreme Court of the United States.*

Petitioner timely appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit, and, for the second time, argued the two (2) issues which the Eighth Circuit had previously decided against it: first, that the district court lacked jurisdiction to hear the case, and second, that neither *Nollan* nor *Dolan* applied to the facts of the case. Petitioner neither independently appealed nor independently argued reversal of the district court's decision to grant Mr. Goss the mandatory injunctive relief which he sought, the rezoning of the property at issue to C-3 without the requirement that Mr. Goss donate a significant portion of it to Petitioner, except as an expected result of any reversal of the two (2) issues which the Eighth Circuit had previously decided against it. *See* Petitioner's Appendix B. Mr. Goss timely cross-appealed the district court's denial of compensatory damages and attorney's fees.

After oral argument, the United States Court of Appeals for the Eighth Circuit issued its opinion on August 10, 1998, in which it refused to reconsider Petitioner's arguments regarding subject matter jurisdiction and the application of the *Nollan/Dolan* line of cases, stating specifically as follows:

> The time to make these arguments has come and gone. We rejected both contentions the first time Little Rock made them. Indeed, we remanded

> with instructions to the District Court to apply *Dolan* in determining whether the dedication requirement was a taking. *See Goss*, 90 F.3d at 309-310. Having rejected Little Rock's arguments before, we will not reconsider them now. *Goss v. City of Little Rock*, 151 F.3d 861, 862 (8th Cir. 1998). *See also* Petitioner's Appendix A at A3.

The Eighth Circuit further reversed the district court's denial of attorney's fees to Mr. Goss, but affirmed the district court's denial of compensatory damages, neither of which is being brought for review before this Honorable Court. Although Petitioner did not appeal it, and without any comment regarding an abuse of discretion on the part of the district court nor any comment regarding the propriety of the district court's issuance of mandatory injunctive relief to Mr. Goss, the Eighth Circuit *sua sponte* reversed the mandatory injunction granted to Mr. Goss by the district court, that Petitioner rezone Mr. Goss' property to C-3 without the attachment of the unconstitutional condition Petitioner attempted to place upon the grant of Mr. Goss' rezoning application. *See* Petitioner's Appendix A.

In its Petition for Writ of Certiorari filed herein, Petitioner once again attempts to argue the same two (2) issues it has argued unsuccessfully twice before in the Eighth Circuit: that the district court lacked jurisdiction to hear this case at all, and that the *Nollan/Dolan* line of cases is inapplicable to the facts of this case.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. **The time for the City of Little Rock to Petition this Honorable Court for Writ of Certiorari on the two issues it presents has come and gone, and its Petition for Writ of Certiorari is untimely by over two years.**

The Eighth Circuit Court of Appeals noted in its latest opinion in the instant case that the same two (2) arguments presented by the City of Little Rock in the second appeal (subject matter jurisdiction/ripeness and application of *Nollan* and *Dolan*) had been previously considered, rejected and ruled upon in *Goss v. City of Little Rock*, 90 F.3d 306 (1996). The Court, in its latest opinion, stated with regard to the subject matter jurisdiction/ripeness and application of *Nollan* and *Dolan* as follows:

> The time to make these arguments has come and gone. We rejected both contentions the first time Little Rock made them. Indeed, we remanded with instructions to the District Court to apply *Dolan* in determining whether the dedication requirement was a taking. *See Goss*, 90 F.3d at 309-310. Having rejected Little Rock's arguments before, we will not reconsider them now . . .
>
> Little Rock does not respond to the District Court's conclusion that it failed to carry its burden of proving rough proportionality between the dedication and the impact of the proposed rezoning. Instead Little Rock makes several arguments that have nothing to do with rough proportionality. Perhaps Little Rock takes this

> course because of its belief that *Dolan* is irrelevant to this case. *If so, that is unfortunate for the city because, as discussed above, the argument that Dolan does not apply is foreclosed by our contrary decision in the previous appeal.* (Emphasis added) *Goss v. City of Little Rock*, 151 F.3d 861 at 862, 863 (8th Cir. 1998); Petitioner's Appendix A at A3, A5.

The doctrine of law of the case was imported from the shores of England and embraced by our judicial system in the United States. Well over 100 years of case law, including several cases handed down by this Honorable Court over the years, soundly conclude that once an issue has been decided on appeal, it becomes *res judicata* for subsequent appeals between the same parties, and the same issue may not be raised again. *See U.S. v. New York Indians*, 173 U.S. 464 (1899); *Thompson v. Maxwell Land Grant & Railway Co.*, 168 U.S. 451 (1897); *Chaffin v. Taylor*, 116 U.S. 567 (1886); *Clark v. Keith*, 106 U.S. 464 (1883); *Ames v. Quimby*, 106 U.S. 342 (1882); *The Lady Pike*, 96 U.S. 461 (1877); *Supervisors v. Kennicott*, 94 U.S. 498, *affirming Kennicott v. Wayne Conty*, Fed.Cas.No. 7,710, 6 Biss. 138, 7 Chi.Leg.N. 41 (1876); *Tyler v. Magwire*, 84 U.S 253 (1872); *Roberts v. Cooper*, 61 U.S. 467 (1857); *Sizer v. Many*, 57 U.S. 98 (1853); *Corning v. Troy Iron & Nail Factory*, 56 U.S. 451 (1853); *Sibbald v. U.S.*, 37 U.S. 488 (1838); *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); and *Himely v. Rose*, 9 U.S. 313 (1809). Further, where a case has first been appealed, and then is tried and the trial court proceeds in conformity with the orders of the appellate court from the first appeal, then the trial court's actions in conforming with the previous orders of the appellate court cannot be

questioned upon a subsequent appeal. *Cook v. Burnley*, 78 U.S. 672 (1870).

If the City of Little Rock had desired to appeal the two (2) issues it lost the first time before the Eighth Circuit in *Goss I*, then, pursuant to Rule 13.1 of the *Rules of the Supreme Court of the United States*, it had ninety (90) days after July 23, 1996, or until October 21, 1996, within which to prepare and file its Petition for Writ of Certiorari asking this Honorable Court to review the two (2) issues. The Petition for Writ of Certiorari filed by the City of Little Rock on December 30, 1998, was simply more than *two years* too late to seek review of the two (2) issues first ruled upon by the United States Court of Appeals for the Eighth Circuit on July 23, 1996. Pursuant to Rule 13.2 of the *Rules of the Supreme Court of the United States* and 28 U.S.C. § 2101(c), the Petition of the City of Little Rock should be *sua sponte* rejected, denied and dismissed as exceedingly untimely.

II. In addition to its untimeliness, the Petition for Writ of Certiorari of the City of Little Rock should be denied as there has been no expansion of *Dolan v. Tigard*, and Petitioner can point to no contrary decisions by any Circuit Court of Appeals.

Petitioner once again, for the fourth time, clamors that *Dolan v. Tigard*, 512 U.S. 374 (1994) does not apply and that *Dolan* is being greatly expanded because it has been applied to an unconstitutional condition attached to an application for rezoning rather than an application for a building permit. Petitioner, by placing all of its eggs in the rezoning/building permit distinction basket, misses

the point. The point is NOT the type of discretionary municipal authorization which is sought, but the UNCONSTITUTIONAL actions of Petitioner in attempting to exact a dedication of a significant portion of real property from an individual small business owner, without compensation, and without any proportionality between the amount of property sought to be exacted by the municipality and the actual effect of the authorization. In *Goss I*, the Eighth Circuit Court of Appeals attempted to educate the City as follows:

> Were Little Rock's regulatory action a simple denial of a rezoning request, we would agree. This portrayal, however, oversimplifies and mischaracterizes Little Rock's actions.
>
> The Little Rock action in question was the *conditioning* of its approval of the rezoning request on the dedication by Goss of a portion of his property. The use of conditions in conjunction with the exercise of police powers has been the subject of a great deal of judicial attention. *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). This attention derives from the frank acknowledgment that states might use conditions in combination with the exercise of their discretionary power to elude the confines of the Constitution and accomplish what might otherwise be clearly impermissible. (Emphasis in original) *Goss v. City of Little Rock*, 90 F.3d 306, 309 (8th Cir. 1996); Petitioner's Appendix B, at B5-B6.

Petitioner, of course, would not listen to the Eighth Circuit, so after it lost at trial, it appealed again, on the

same issues, to the Eight Circuit. In *Goss II*, the Eighth Circuit, in footnote two (2), again tried to enlighten Petitioner as follows:

> Little Rock argues that, because it denied Goss's rezoning application and thus did not alter the status quo ante, it cannot possibly have taken Goss's property without just compensation. We disagree. It is true that this case differs from *Nollan* and *Dolan* in that in each of those cases the government granted the applicant's request subject to the unconstitutional condition, *see Nollan*, 483 U.S. at 828, 107 S.Ct. 3141; *Dolan*, 512 U.S. at 379, 114 S.Ct. 2309, whereas in this case Little Rock denied Goss's request because Goss would not agree to the condition. This distinction, however, is a mere technicality that does not save Little Rock's action from constituting a taking. What Little Rock did amounted to granting Goss's request subject to the dedication requirement. Little Rock's Planning Commission recommended that the City Board of Directors do exactly that. Then, because Goss would not agree to the condition, the City Board denied his request. In essence, this was no different from what transpired in *Nollan* and *Dolan*. *Goss v. City of Little Rock*, 151 F.3d 861, 864, fn.2 (8th Cir. 1998); Petitioner's Appendix A, at A6, fn.2.

The cases cited by Petitioner in support of its Petition for Writ of Certiorari are either wholly inapplicable, as they refer solely to zoning ordinances of general, rather than specific application, or are not in conformity with this Honorable Court's decisions in *Nollan* and *Dolan*. Further, Petitioner states an outright untruth when it claims on page ten (10) of its Petition that "the Eighth Circuit stated [*in Goss I*] that its focus in this case was on

the 'advancement of a legitimate state interest' test for a Taking set forth in *Agins*." Rather, the Eighth Circuit commanded the district court to apply *Dolan* to inquire into "the existence of the required nexus or, if a nexus exists, whether the demanded dedication bears some rough proportionality to the projected impact of the proposed rezoning." *Goss v. City of Little Rock*, 90 F.3d 306, 310; Petitioner's Appendix B, at B8.

Petitioner repeatedly misapplies and misunderstands the intent and import of this Honorable Court's pronouncements in *Nollan* and *Dolan*, and its Petition for Writ of certiorari should be denied and dismissed.

III. In addition to its untimeliness, the Petition for Writ of Certiorari of the City of Little Rock should be denied as Petitioner fails to state any applicable cases from other jurisdictions which are in conflict with the subject matter jurisdiction of *Goss I* or *Goss II*.

Petitioner again wails, for the fourth time, that the district court lacked subject matter jurisdiction to hear Mr. Goss' case, and that there existed an adequate remedy at state law. The adequate remedy to which Petitioner refers is a state inverse condemnation procedure, pursuant to which Mr. Goss would be required to allow Petitioner to have his land. As has been often and repeatedly stated throughout the past four (4) years, Mr. Goss' only remedy would be injunctive relief, which he could only achieve through federal court, as Arkansas state law provides no other redress. Petitioner's assertions to the contrary, Mr. Goss has repeatedly pointed out that no adequate remedy under state law existed, as the only

remedy pursuant to Arkansas law is payment for land taken. Petitioner has made it abundantly clear that its interest is in obtaining Mr. Goss' property, free of charge, and that it intends to acquire Mr. Goss' property by any method possible. Interestingly enough, the City has not attempted to obtain Mr. Goss' property by any constitutionally valid method.

Petitioner points to another Eighth Circuit case out of Arkansas as standing for the proposition that Mr. Goss' remedy is in state court. *McKenzie v. City of White Hall*, 112 F.3d 313 (8th Cir. 1997). What Petitioner fails to point out is that in *McKenzie v. City of White Hall*, the McKenzies *gave up* their property in exchange for rezoning. *Id.* Once the property had been deeded to the municipality, the Eighth Circuit stated that the only remedy for the McKenzies would be in a state court action for inverse condemnation. *Id.* If the McKenzies had refused to give up their land, then their remedy would have remained in federal court.

The remaining cases cited by Petitioner do not apply to the case at hand, as each is concerned with legislative pronouncements of general application, rather than the individualized adjudication assessed against Mr. Goss. Petitioner's mis-characterization of its actions cannot, and do not, withstand even the barest of scrutiny.

CONCLUSION

For the foregoing reasons, Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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